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NO.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

AVIATION ASSOCIATES, INCORPORATED,

Petitioner,

V.

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Whether an interest arbitrator who determines an issue outside the submission of the issues presented by the parties acts outside his jurisdiction in violation of the Railway Labor Act and the decisions of this Court.

II. Whether a court is required to remand questions of fact or ambiguities arising out of an arbitrator's award to the arbitrator for clarification.

III. Whether a court may disregard the standards for ruling on summary judgment proceedings promulgated by this Court in upholding an arbitration award.

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v.

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Aviation Associates, Inc. ("AAI" or the "Company")[1] petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App.A)[2] is reported at 955 F.2d 90, and the First Circuit's Order denying AAI's petition for rehearing is reprinted at App.B. The opinion of the United States District Court for the District of Puerto Rico is reported at 762 F.Supp. 6 and is reprinted *infra* at

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[1] Pursuant to Rule 29.1, Aviation Associates, Inc., petitioner herein, was at all times material to this suit a wholly-owned subsidiary of Metro Airlines, Inc. Subsequent to the events at issue in this suit, all of the stock of Aviation Associates, Inc. has been transferred to private individuals.

[2] References to (App. ___) are to the Appendix to this petition.

App.C. The arbitrator's award at issue is unreported, and is reprinted *infra* at App.D.

JURISDICTION

The judgment of the Court of Appeals (App.A) was entered on January 28, 1992, and AAI's petition for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals on February 24, 1992 (App.B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* are set out below:

> If any employee or group of employees, or any carrier, is aggrieved . . . by any of the terms of an award or by the failure of the division to include certain terms in such award, such employee or group of employees or carrier may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review of the division's Order . . . The court shall have jurisdiction to affirm the Order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and Order of the division shall be conclusive on the parties, except that the Order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the Order to conform, or confine itself, to matters within the scope of the division's jurisdiction . . . The judgment of the Court shall be subject to review as provided in §§ 1291 and 1254 of Title 28.

45 U.S.C. § 153 First (q).[3]

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[3] While § 153 does not directly apply to air carriers, 45 U.S.C. § 181, this Court has held that the review and standards in the airline industry are to conform with the purposes and standards of the Act. *IAM v. Central Airlines*, 372 U.S. 681 (1963);

> Such petition for the impeachment or contesting of any award so filed shall be entertained by the Court only on one or more of the following grounds: (a) that the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter; (b) that the award does not conform, nor confine itself to the stipulations of the agreement to arbitrate . . .

45 U.S.C. § 159 Third (b).[4]

The purpose and Congressional intent underlying Rule 56 of the Federal Rules of Civil Procedure are also involved in this case, but no specific statutory provisions are controlling.

STATEMENT OF THE CASE

AAI is a United States certificated carrier by air operating as a scheduled commuter airline in the Caribbean area. As

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see also Consolidated Rail Corp. v. RLEA, 491 U.S. 299, 109 S.Ct. 2477, 2480-81 (1989) (all "Boards" under Act subject to limited statutory grounds for review). Generally stated, the grounds for review are whether the arbitrator's decision (1) is beyond the scope of the contractual limitations placed upon his authority, *Loveless v. Eastern Air Lines, Inc.,* 681 F.2d 1272, 1276 (11th Cir. 1982); (2) ignores the plain and unambiguous provisions of the contract, *United Paperworkers AFL-CIO v. Misco,* 484 U.S. 29 (1987); (3) imposes a remedy that is expressly excluded by the agreement or submission, *Bruno's v. United Food & Com. Wkrs. Int'l,* 858 F.2d 1529 (11th Cir. 1988); or (4) is wholly baseless and without reason, *Gunther v. San Diego & A. E. Ry.,* 382 U.S. 257 (1965).

There is no dispute here as to the standards under which this case was decided. The standards are whether the arbitrator exceeded his jurisdiction as set (a) by the parties' submission to him (§ 159(b)) and/or (b) acted outside his jurisdiction by disregarding the explicit contractual mandates under which the case was conducted. Also involved is the failure of the courts below to remand the controversy to the arbitrator for *his* consideration (§ 153, First (q)).

[4] The instant interest arbitration was not conducted under the provisions of 45 U.S.C. §§ 157-159. Because it was conducted under the Railway Labor Act, however, the statutory standards of review for such arbitrations is material. *See Consolidated Rail Corp., supra; Central Airlines, supra;* and other cases cited.

such, it is subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (the "Act"). The Airline Pilots Association ("ALPA") is a labor organization which represents the pilots of air carriers.

AAI, at the time relevant to this proceeding, was a wholly-owned subsidiary of Metro Airlines, Inc. ("Metro"). Metro also owned several other air carriers which operated in various areas of the United States. In April 1989, pursuant to collective bargaining negotiations with ALPA, an agreement was reached covering certain of these operations.[5]

Contemporaneously with the execution of this agreement, based upon voluntary recognition of ALPA by AAI, AAI and ALPA entered into an agreement (the AAI "side letter") that certain terms of the April, 1989 agreement would apply to its operation, that certain provisions would not apply, and the parties would negotiate thereon. If negotiations failed to produce an agreement, the parties agreed to submit the dispute to a neutral, interest arbitrator under the standards set forth in Article 1,§ 6 of the April 1989 agreement.

The parties were unable to resolve all open issues and the case was submitted to Preston J. Moore, who was selected as the interest arbitrator. The hearing date initially selected was canceled due to the devastation caused by Hurricane Hugo and was ultimately heard some 85 days later.

The precise issues submitted to the arbitrator for decision were submitted by stipulation. Retroactivity of the award (or any portion thereof) was not included in the submission. Retroactivity was not raised by ALPA during the hearing or in its closing submission.[6] Indeed, it was not until ALPA

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[5] Metroflight, Inc., Metro Express, Inc. and Chaparral Airlines, Inc. were the subsidiaries covered by the agreement.

[6] As noted by both Arbitrator Moore and the district court, the delay in the hearing was not the fault of either party. Rather, the delay in the hearing was caused by an external event which impacted upon the parties' *intent* in issuance of the award. Hurricane Hugo did not impact the contractual provision specifying the date upon which the award was to be effective.

submitted its post-hearing brief that retroactive application was requested.[7] However, ALPA's request was simply an alternative prayer. The issue of retroactivity was not presented in ALPA's substantive arguments. ALPA's prayer initially requested the award be made effective as of the April 1989 execution of the contract.

On March 7, 1990, the arbitrator entered his award, directing that the pay rates were to be retroactive to October 15, 1989. The arbitrator's award contained no justification or rationale for the retroactivity — simply the one sentence declaration.

AAI promptly requested the arbitrator to reconsider the retroactive portion of the award. The basis of the request was jurisdictional — that the agreement explicitly provided for prospective relief only. Initially, the arbitrator granted the request. ALPA objected, asserting that the neutral no longer had jurisdiction (*"functus officious"*). Subsequently, the arbitrator agreed and withdrew his modification. AAI declined to comply with that portion of the award requiring retroactive payment, resulting in a lawsuit filed by ALPA.

The pertinent contractual language, under which the interest arbitration was conducted,[8] provides:

> In the event that the parties do not reach agreement within one hundred twenty (120) days of the start of negotiations, the parties agree that all open issues shall be determined by final and binding arbitration. The arbitrator shall be selected from a panel of five (5) arbitrators to be provided by the FMCS, consisting of members of the National Academy of Arbitrators with experience in the airline industry. The arbitrator shall have the authority, in consultation with the parties, to establish procedural rules

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[7] At the close of the hearing, the parties and arbitrator procedurally agreed that simultaneous post-hearing briefs to the arbitrator would be filed.

[8] The AAI-ALPA side letter provided that the issues unresolved in negotiations were to be arbitrated pursuant to the provisions of Article 1, § 6(a) and (b) of the basic agreement.

> for an expeditious hearing and decision upon the issues. The arbitrator shall take into account and must base the decision upon average competitive conditions in the geographic area for wages and working conditions for comparable operations, including any ALPA collective bargaining agreements. The intent of this provision is that a decision shall be issued within one hundred eighty (180) days after date of acquisition or start-up. *Any award shall be effective on the first day of the next month which starts thirty (30) days after issuance and shall run concurrently with the duration of this agreement.* (Emphasis added).

Both parties moved for summary judgment based upon essentially undisputed facts. By Memorandum Opinion and Order, the district court for the District of Puerto Rico granted ALPA's motion and enforced the award. In its ruling, the district court construed the contract as requiring that an award be issued within one hundred eighty (180) days. The district court held that the delay caused by Hurricane Hugo created a "latent ambiguity" in the contract. Specifically, the district court found that although Article 1, § 6(b) was explicit as to when the arbitration award was to be effective, the immediately preceding sentence concerning the parties' intent as when the award should issue could not be enforced due to Hurricane Hugo, thus creating a latent ambiguity in the contract.[9] The district court made this ruling despite the fact that the arbitrator no where in his award undertook to interpret any ambiguity or otherwise indicated that any ambiguity existed in the contract.

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[9] This ruling elevated the importance of the parties' *intent* as to the time frame for an award into a jurisdictional limitation, thus creating the purported conflict with the clear jurisdictional requirement as to *when* the award was to be effective. In ruling that the parties' intent on when an award should issue was a "jurisdictional" requirement, the decisions below inappropriately equated the parties' precetory intent with the mandatory jurisdictional requirements. *See Jones v. St. Louis-S.F. Ry.*, 728 F.2d 257, 265 (6th Cir. 1984) ("goal" of when award is to be issued is not a jurisdictional requirement unless expressly stated by parties).

In addition, the district court ruled that the issue of retroactivity was properly before the arbitrator. The district court acknowledged that retroactivity of the award was never an issue submitted to the arbitrator for decision at any point in the proceedings, but proceeded to rely on ALPA's prayer for relief in its post-submission brief (App.C; 762 F.Supp. at 8).

On appeal, the First Circuit Court of Appeals affirmed the district court's findings. Like the district court, the First Circuit acknowledged that "the issue of retroactivity was not considered during the [arbitration] hearing" (App.A; 955 F.2d at 92). However, in upholding the arbitrator's award, the First Circuit ruled that the arbitrator had the authority to resolve any ambiguity in the contract. By so holding, the First Circuit completely miscast the question before it. First, the arbitrator was never presented with nor considered the issue; it was the trial court that created this interpretive ambiguity. Second, the question presented on appeal was not whether the arbitrator had the authority to resolve ambiguities. Rather, the question was whether the arbitrator had the jurisdictional authority to provide retroactive relief.

The First Circuit affirmed the trial court's award based on the trial court's created ambiguity in the contract, completely ignoring the fact that the arbitrator was admittedly never presented with, nor considered or interpreted, the contractual language and did not find that an ambiguity existed. Further compounding this error, the First Circuit then refused to construe the court-created ambiguity in favor of AAI, in complete disregard of this Court's well-established summary judgment standards. The First Circuit also dismissed AAI's request for remand to allow the arbitrator to resolve the issue of whether the contract was in fact ambiguous, and, if so, how that ambiguity was to be

resolved, in accordance with this Court's teaching in *United Paperworkers AFL-CIO v. Misco*, 484 U.S. 29 (1987).[10]

The conclusions of the First Circuit and the grounds underlying those conclusions are at odds with the applicable decisions of this Court, the mandates of the Act and are in conflict with the law of other circuits. For the reasons discussed below, AAI respectfully submits that this Court should grant the instant Petition, and review and reverse the decision of the First Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST CIRCUIT'S HOLDING THAT THE RETROACTIVE PORTION OF ARBITRATOR MOORE'S AWARD IS ENFORCEABLE IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

It should be beyond dispute that the arbitrators' jurisdiction in this case was limited to the issues submitted to him by the parties. *See, e.g.*, 45 U.S.C. § 159 Third (b). However, the First Circuit upheld the arbitrator's award on an issue completely outside the parties' submission. Moreover, the First Circuit ignored the procedures specified in the Act (§ 153(q)) and endorsed by this Court by refusing to remand the question to Arbitrator Moore. In so holding, the appellate court ignored the established standards for summary judgment proceedings, and acted contrary to the law of this Court, the express mandates of the Act and the established

[10] *Misco* arose under the Labor Management Relations Act. Its teaching, however, is totally consistent with the statutory standards set forth in the Act. 45 U.S.C. § 153 First (q); *See, e.g.*, Part II, *infra*.

precedent of other circuit courts in the United States federal judicial system.[11]

A. Arbitrator Moore Acted Outside His Jurisdiction By Awarding Retroactive Relief.

This case involves an interest arbitration award, not the more traditional contract interpretation award. In interest arbitration, the arbitrator is undertaking to determine and set the contractual terms and conditions of employment which will govern the parties' relationship in the future. *See generally*, Elkouri & Elkouri, *How Arbitration Works*, 101-108 (BNA 3d ed., 1985) (herein "Elkouri").

Because there is no contractual term to be interpreted as such in interest arbitration, the parties' submission of the issues to be determined is critical. *See, e.g.*, 45 U.S.C. § 159 Third (b). Indeed, it is the arbitrator's role to set the terms on the specific issues presented. The issues submitted for decision are a limit on the jurisdiction of the arbitrator. An interest arbitrator simply has no jurisdiction to decide an issue not submitted. For example, an interest arbitrator asked solely to set a future wage rate by the parties would clearly lack the authority to award additional holidays. In the present case, the parties specifically set forth by stipulation the issues to be decided. The effective date of the award was not one of the issues submitted.[12]

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[11] Under Supreme Court Rule 10.1, these events justify the grant of this Petition. There are special and important reasons therefore. There is a conflict with applicable decisions of this Court; there is a conflict with other circuit decisions; the decisions below have so far departed from established legal standards that this Court's exercise of supervision is called for. Further, the issues involved are of *public* importance because they involve administration of the legal standards under the Act concerning review of arbitration awards. *See, e.g., Lane v. Bowler Corp.*, 261 U.S. 387, 393 (1923).

[12] The issue of retroactivity was not submitted because, as discussed *infra*, the contract clearly and unambiguously specified *when* the award would become effective.

The issues submitted are not, however, the only limitation on authority. The *standards* by which the issues submitted are to be resolved are also a limitation. *See, e.g.*, Elkouri, p. 102. The standards to be applied by Arbitrator Moore in reaching his decision were set forth in Article 1, § 6 of the agreement. These standards were the jurisdictional framework by which Arbitrator Moore was required to decide the issues presented. They were *not* merely "procedural rules" to be applied by Arbitrator Moore in reaching his decision.[13] As an example, had Arbitrator Moore entered an award on wages based upon the conclusion that AAI "could afford it," he would have clearly violated the contractual mandate specified.

While the differences in the types of arbitration are important, there is, as noted *supra*, a substantial similarity in the standards of review applied to arbitration awards under the Act. *See* 45 U.S.C. § 153 First (q), § 159 Third (b). AAI recognizes that judicial review of arbitrator's award is conducted within a narrow framework.[14] In this case, Arbitrator Moore's award clearly violated the statutory mandates. Specifically, Arbitrator Moore's award failed to conform or confine itself to matters within the scope of his jurisdiction *and* exceeded the parties' stipulation of the agreed issues to be arbitrated. Simply put, the retroactive portion of Arbitrator Moore's award clearly exceeded his grant of jurisdiction. Indeed, in the words of this Court in *Gunther v. San Diego & A. E. Ry.*, 382 U.S. 257 (1965), the award is "wholly baseless

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[13] Indeed, the standards in this case required that the "procedural" rules be set by the arbitrator "in consultation with the parties" (Article 1, § 6(b)).

[14] There is no dispute over the standards of review applicable under the Act. An arbitration award may be set aside for (1) failure to comply with the requirements of the Act; (2) failure of the arbitrator to conform, or confine, himself to matters within the scope of his jurisdiction; and (3) fraud or corruption. *See* 45 U.S.C. § 153 First (q), § 159 Third (b); *see, e.g., Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 99 (1978); *Consolidated Rail Corp., supra; Central Airlines, supra.*

[under the contract's express provisions]" and "without reason."

In light of the agreement's unambiguous language and the absence of submission of the issue, Arbitrator Moore's award was clearly outside his jurisdictional authority. In upholding this extra-jurisdictional award, the First Circuit failed to follow this Court's decisions, acted contrary to the decisions of its sister circuits and clearly ignored and fractured the explicit mandate of the Act which should have guided its decision.

As this Court has dictated and the Act requires, an arbitrator is not free to disregard or ignore plain and unambiguous provisions of a collective bargaining agreement. *United Paperworkers AFL-CIO v. Misco,* 484 U.S. 29 (1987). This Court has also firmly stated that "when an arbitrator's award manifests an infidelity to [his] obligation, courts have no choice but to refuse enforcement of the award." *United Steel Workers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).[15] Indeed, "an arbitrator is confined to interpretation of the collective bargaining agreement; he does not dispense his own brand of industrial justice." 363 U.S. at 597. In line with these holdings, the appellate courts (including the First Circuit) consistently hold that if the arbitrator "interprets unambiguous language in any way different from its plain

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[15] While this Court has not ruled on this issue under the Act, it has emphasized that review and enforcement of awards under the Act is comparable to review of an award under an LMRA contract. *See Central Airlines, supra,* at 362; *BLE v. Santa Fe R.R.,* 768 F.2d 914, 921 (7th Cir. 1985); *Loveless v. Eastern Airlines, Inc.,* 681 F.2d 1273, 1276 (11th Cir. 1985); *BRT v. Central of Ga. Ry.,* 415 F.2d 403, 411-12, 415 & n.21 (5th Cir. 1969), *cert. denied,* 396 U.S. 1008 (1970). Because the statutory standards at issue have not been directly addressed in the context of contractual limitations on an arbitrator's (system board's) jurisdiction, this Petition should be granted to address and resolve this important issue.

meaning, [the arbitrator] amends or alters the agreement and acts without authority."[16]

The limits on an arbitrator's contractual authority apply with equal force to the remedy awarded. It is well-settled that an arbitrator may not impose a remedy that is expressly excluded by the agreement or submission. *United States Postal Service, supra,* 922 F.2d at 259-60; *Bruno's v. United Food & Commercial Workers Int'l,* 858 F.2d 1529 (11th Cir. 1988); *Main Cent. R.R. v. Brotherhood of Maintenance of Way Employees,* 653 F. Supp. 425 (D.Me. 1987), *aff'd,* 873 F.2d 425 (1st Cir. 1988). Indeed, even the First Circuit has recognized that an arbitrator's jurisdictional authority lies within the arbitration agreement. In *Strathmore Paper Co. v. United Paperworkers Int'l Union,* 900 F.2d 423 (1st Cir. 1990), the court specifically stated:

> An arbitrator does not have unfettered discretion, and may not impose a remedy which directly contradicts the express language of the agreement. Nor can he or she interpret a clause or provision when its language is clear, unequivocal and unambiguous.

Article 1, Section 6(b) under which the arbitration was conducted is explicit as to *when* the arbitration award is to be effective:

> Any award *shall be effective* on the first day of the next month which starts thirty (30) days after issuance . . . (Emphasis added).

The requirement of § 6(b) is mandatory. In this explicit provision, the arbitrator's authority was limited to an award of prospective relief only.

The First Circuit's infidelity to this Court's decisions is manifest in its opinion. By stating that the arbitrator had the

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[16] *Northwest Airlines v. International Associates of Machinists District Lodge No. 143,* 894 F.2d 998 (8th Cir. 1990); *United States Postal Service v. American Postal Workers,* 922 F.2d 256 (5th Cir.), *cert. denied* ___ U.S. ___, 112 S.Ct. 297 (1991); *Inter-City Gas Corp. v. Boise Cascade Corp.,* 845 F.2d 184, 187 (8th Cir. 1988); *Hoteles Condado Beach v. Union Day Troquistas, Local 901,* 763 F.2d 34, 41 (1st Cir. 1985).

authority to resolve any ambiguities in the contract, the First Circuit miscast the question before it. The question presented was not whether Arbitrator Moore had authority to resolve ambiguities which were not presented to him. Rather, the question was whether Arbitrator Moore had the authority to provide retroactive relief. This oversight resulted in the courts below departing from the standards set by this Court and the Act. Initially, the First Circuit acknowledged that the "issue of retroactivity was not considered during the [arbitration] hearing." It proceeded to ignore the Act's mandate that only issues presented can be decided. 45 U.S.C. § 153 Third (b).

Moreover, the First Circuit ignored the fact that Arbitrator Moore *never ruled* on any perceived ambiguity. Instead, the First Circuit relied upon the *district court's* ruling that the provisions of the collective bargaining agreement, "while originally unambiguous, had been rendered ambiguous by events."[17] The First Circuit also relied upon its belief that the *district court* felt that Arbitrator Moore could have resolved this "ambiguity." Although the record is clear that this purported ambiguity and issue of retroactivity was not submitted to him for decision[18] and is completely devoid of any facts showing that *Arbitrator Moore* ever addressed any ambiguities, the district court, followed by the First Circuit, took it upon themselves to "create" an ambiguity where

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[17] Because no ambiguity appeared on the face of the contract, the asserted ambiguity is properly characterized as a "latent ambiguity." 4 Samuel Williston, *A Treatise on the Law of Contracts*, § 627 (3d ed. 1991) (herein "Williston on Contracts"). However, the district court and the First Circuit simply misapplied the legal parameters of the doctrine. While a court is free to consider extrinsic evidence in an attempt to interpret a latently ambiguous provision, the court cannot use extrinsic evidence to modify unambiguous portions of the contract. Instead, the doctrine of partial impossibly applies. *See* Part II, *infra*.

[18] Contrary to the position of the district court and the First Circuit, raising an issue in a post-hearing brief is *not* a submission of that issue. *See* footnote 13, *infra*.

none existed.[19] The district court then based its ruling in favor of ALPA on this court-created ambiguity. This course of action is clearly improper and contrary to the decisions of other circuit courts, in addition to prior decisions of the First Circuit.[20] It is clear that in making its ruling, the First Circuit relied upon a factual inference on a theory *created* by the district court, rather than the actual facts presented.

The question of Arbitrator Moore's jurisdiction is simple: if he makes a determination on an issue not in the submission, he acts outside of his jurisdiction. 45 U.S.C. § 159, Third (b). By ignoring the express provisions of the contract as to when the award was to be effective, Arbitrator Moore clearly acted outside of his jurisdictional authority. Necessarily, when an arbitrator rules on issues outside of his jurisdiction, he "manifests an infidelity to his obligation," and his award simply cannot stand. In this case, the district court and the First Circuit acknowledged that the issue of

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[19] The lower courts, in conflict with the Sixth Circuit's decision in *Jones v. St. Louis-S.F. Ry., supra*, simply elevated a "goal" of the parties into a jurisdictional directive, thus *creating* the purported conflict with the contract's clear mandate as to *when* the award was to be effective. Properly recognized as a "goal," the provision on the time for issuance of an award affected by Hurricane Hugo, creates no latent ambiguity. The "goal" was not met due to external events, but this does not grant license to ignore or modify the other, clear and unambiguous terms of a contract. *See, e.g., cases cited* footnote 20, *infra.*

[20] *Metropolitan Life Ins. Co. v. R.J.R. Nabisco, Inc.*, 906 F.2d 884 (2nd Cir. 1990) (parties' rights under unambiguous contracts should be interpreted from terms in instrument rather than from extrinsic evidence or judicial views as to what terms might be preferable); *Esplanade Oil & Gas v. Templeton Energy Income*, 889 F.2d 621 (5th Cir. 1989) (disputes about contractual provisions do not render provisions ambiguous; court must give effect to ordinary meaning of words and may not create ambiguity where none exists); *Georgia Pacific Corp. v. Local 27, United Paperworkers Int'l. Union*, 864 F.2d 940 (lst Cir. 1988); *Franklin Elec. Co. v. U.A.W.*, 886 F.2d 188 (8th Cir. 1989) (award that exceeds arbitrator's contractual authority fails to draw its essence from the agreement and must be vacated, despite usual deference given to arbitrators).

retroactivity was not presented in the parties' submission nor considered during the arbitration hearing.[21]

Despite acknowledgement at every stage of these proceedings that Arbitrator Moore considered an issue not submitted to him, the First Circuit affirmed his "infidelity to his obligation" and permitted Arbitrator Moore to "dispense his own brand of industrial justice."[22] In sum, the First Circuit expressly failed to follow prior decisions of this Court and its

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[21] Despite at least three distinct opportunities to raise the issue (in the submission of issues, during its opening remarks and in its final written proposal to the arbitrator), ALPA never raised retroactivity as an issue.

[22] Presumably based on ALPA's alternative prayer for relief in the post-submission brief, the First Circuit attempted to justify its departure from the acknolwedged legal precepts by articulating a "waiver" theory. The affidavit upon which it purported to rely does not support the First Circuit's holding either factually or legally. The affidavit of A.J. Harper II relied upon by the First Circuit reads: "Rather, ALPA's only comment to counsel for AAI — but not the arbitrator — was that it might seek to have the arbitrator make a retroactive award to compensate *for the delay in the holding of the hearing.* I advised ALPA it was free to present the issue to the arbitrator if it so desired. It did not do so until its post hearing brief" *(emphasis added).*

The First Circuit's holding that AAI "waived" the right to object to the arbitrator's retroactivity award is utterly without merit. Although several definitions of the waiver doctrine exist, the fundamental elements of waiver require that a party "voluntarily and intentionally relinquish a known right." *See* 5 *Williston on Contracts,* § 678; *Pitts v. American Sec. Life Ins. Co.,* 931 F.2d 351, 357 (5th Cir. 1991). Merely stating in an affidavit that ALPA *could* raise an issue concerning the time of *delay* in hearing (85 days) before the arbitrator if it chose to do so is *not* a conscious waiver of a known right (*i.e.,* no retroactivity under the contract). AAI simply had no right to preclude ALPA from raising the issue. Its statement is not a concession that ALPA's position was correct nor that AAI was waiving its insistence that no such right existed.

Moreover, the First Circuit completely ignored the argument in response to the rationale created by the district court, that AAI had no opportunity to contest ALPA's "argument" (if the Prayer for Relief can be so construed) for retroactivity. The parties, by agreement and with the concurrence of the arbitrator, did not procedurally allow reply briefs. Only briefs-in-chief, simultaneously filed, were authorized. This procedure is the norm in arbitration. *See* R.J. Schoonhoven, Ed.,

decision conflicts with the well-established law of other circuit courts of appeal. A court cannot uphold an arbitration award which ignores the plain and unambiguous provisions of a collective bargaining agreement. Nor can a court uphold an award which is outside the submission to and jurisdiction of the arbitrator. Arbitrator Moore's award of retroactivity is contrary to both these precepts established by decisions of this Court and the Act. Not only do the lower courts' decisions conflict with the decisions of this Court, other circuit courts and the Act, but the issues decided are of public importance to the administration of the Act and standards for review of arbitration awards which warrant review by this Court. This Petition should be granted.

B. The First Circuit Failed To Remand This Case To Arbitrator Moore.

Fundamentally, the courts below were striving to create a rationale by which the award could be sustained. Stated differently, the courts below were trying to articulate a basis upon which the arbitrator could have reached his result concerning retroactivity of the award, *had it it in fact been presented to him*, even though both courts admitted this was not the case. Rather than undertaking to create an ambiguity by which a rationale for the award is sought, the proper course is that dictated by this Court in *United Paperworkers Int'l. v. Misco,* 484 U.S. 29, 42 (1987) and specifically endorsed by the Act, § 153, First (q). The courts below simply ignored this Court's teachings and the Act's mandate.[23]

Fairweather's Practice and Procedure in Labor Arbitration, 368, n.31 (BNA 3d ed. 1991); Elkouri, p. 274, n.213.

[23] The decisions below also conflict with the decisions of the other circuits which have confronted an award under the Act containing an apparent ambiguity or award outside the grant of jurisdiction. The other circuits have uniformly held in such circumstances that remand to the arbitrator for clarification and resolution is required. *See, e.g., cases cited* footnotes 24 & 25, *infra.*

Assuming that an ambiguity existed, the First Circuit ruled that the district court resolved this "latent ambiguity" (created by external events) and purportedly relied upon this Court's holding in *Misco*. However, the First Circuit misapplied the holding of *Misco* to the present case by failing to remand questions of fact to the arbitrator.

As this Court has repeatedly stated, disputes of fact may not be addressed by the district court even if the court is convinced that the arbitrator committed serious error. *Misco, supra; Enterprise Wheel, supra.* Although correctly noting this mandate, the First Circuit failed to address the procedure specifically endorsed by the Act and this Court in *Misco*, requiring remand to the arbitrator if ambiguities in a labor contract are presented. In *Misco*, this Court expressly stated that before disposing of a case where ambiguities exist, "the proper course would [be] remand to the arbitrator for definitive construction of a contract." *Misco, supra* at 42. Indeed, this course has been consistently adopted by the circuit courts of appeal.[24]

In addition, the Act specifically endorses remand to the arbitrator for clarification of vague awards. *See* 45 U.S.C. § 153 First (q); *Transportation Union v. Union Pac. R.R.*, 385 U.S. 157, 165 n.4 (1986). In fact, other circuit courts have held consistently that remand is especially appropriate to clarify questionable jurisdictional or vague remedy awards rendered under the Act.[25]

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[24] *Local 4830 v. New Idea Farm Equipment*, 917 F.2d 964 (6th Cir. 1990) (courts may not go beyond an award to decide questions that the arbitrator did not decide; ambiguous award may not be enforced and should be remanded for clarification); *Newark Morning Ledger v. Local 103*, 797 F.2d 162 (3rd Cir. 1986) (district court compelled to modify arbitrator's award where no rational basis for award exists); *AFSCME Local Lodge 1803 v. Medical Center*, 715 F.2d 1517 (11th Cir. 1983) (when terminology in award can be interpreted in a variety of ways, "normal course" is to remand the arbitrator for clarification). *See also* footnote 25, *infra.*

[25] *See Hart v. Overseas National Airways, Inc.*, 541 F.2d 386 (3d Cir. 1976) (if vague damage award not remanded, district court

Highlighting the reasons for this Court's doctrine regarding remand and the flaws in the lower courts' erstwhile effort to create a rationale is the First Circuit's express recognition that the award is *erroneous and contrary to the agreement, even under the district court's supplied rationale* (App. A, 955 F.2d at 94).[26] Despite this recognition, the First Circuit refused to remand this award to the arbitrator, or to reform the award to reflect the contractual mandate contained in Article 1, § 6(b). In so ruling, the court's opinion is in conflict with this Court's opinion in *Misco* and the holdings of its sister circuits, noted *supra*, holding that remand to the arbitrator or reformation of the award is required. The failure to remand or reform the award does violence not only to this Court's directions and the Act's mandates, but is a gross misapplication of the doctrine upon which the courts below purported to rely.

The courts below used an external event (Hurricane Hugo) to create an "ambiguity" not found within the express terms of the contract, *i.e.*, a latent ambiguity. However, this latent ambiguity affected only the provision of the contract relating to *the parties'* "intent" that an award issue within 180 days. Hurricane Hugo did not impact and left completely untouched the precise, unambiguous provision concerning *when* the award is to be effective. The external event, thus, did not create conflicting contractual provisions. Instead, the external circumstances rendered the parties' intent as to the *issuance* of the award incapable of being performed, giving rise to the doctrine of partial impossibility. The doctrine of

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"would be preempting the fact finding functions which had been assigned by the parties to the referee, a preemption which is neither sound nor appropriate"). The result is the same under the LMRA. *Bell Aerospace Co. Div. of Textron v. Local 516, Int'l, Etc.*, 500 F.2d 921 (2d Cir. 1974); *Int'l Brotherhood of Elec. Wkrs., Loc. 369 v. Olin Corp.*, 471 F.2d 468 (6th Cir. 1972); *Hanford v. General Electric Co.*, 353 F.2d 302 (9th Cir. 1965).

[26] As the First Circuit acknowledged, it is clear under the agreement, as interpreted by the courts, the award cannot be effective prior to December 1, 1991.

partial impossibility can excuse performance of the promise *to which it relates;* it is *not* to be used to modify other unambiguous contractual provisions capable of performance. Restatement (Second) of Contracts, § 270. Indeed, this Court established long ago that where one of alternative promises is at the time, *or subsequently becomes*, impossible of performance, the parties to a contract are not relieved from performing the other. *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926).[27] Clearly, then, the First Circuit had the obligation not to attempt to seize upon the inability to perform one promise as a justification for disregarding or modifying another clear and unambiguous provision. This action is at odds with the decisions of this Court,[28] as well as with other courts of appeal.[29]

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[27] Here, as discussed *supra*, the courts below elevated the parties "goal" of when an award was to issue into a distinct and separate promise from that specifying when the award was to be effective. In so doing, the courts below not only created an ambiguity where none existed, but also violated the well-established principle that general provisions (here, the parties' intent) must give way to specific provisions (*i.e.*, the mandatory provision concerning when the award was to be effective). *See generally, Affiliated Food Distr., Inc. v. Local Union No. 229*, 483 F.2d 418 (3d Cir. 1973); *Kenneth Reed Constr. Corp. v. United States*, 475 F.2d 583 (Cl.Ct. 1973); *United States Postal Serv. v. American Postal Workers*, 922 F.2d 256 (5th Cir. 1991).

[28] *Misco, supra*, at 38 (if language of an agreement is clear and unequivocal, an arbitrator cannot give it a meaning other than that expressed by the agreement).

[29] *See, e.g., Newark Morning Ledger, supra; Delta Queen Steamboat Co. v. District 2, Marine Engineers*, 889 F.2d 599, 602 (5th Cir. 1989) (arbitrator may look beyond written contract only if the instrument is ambiguous or silent upon a *precise* question); *UAW v. Yardman, Inc.*, 716 F.2d 1476, 1480 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)(court is to construe contract's provisions consistently with one another to *avoid* rendering a provision nugatory); *Northwest Airlines, Inc. v. Int'l Assoc. of Machinists*, 894 F.2d 998, 100 (8th Cir. 1990) (arbitrator may not disregard or modify unambiguous contract provisions); *Hocker v. New Hampshire Ins. Co.*, 922 F.2d 1476 1482 (10th Cir. 1991)(contractual terms are not to be given strained readings to create ambiguities where none exist); *Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984) (Board attempt to alter clear contractual provision

As noted above, the record is completely devoid of *any* ruling by the arbitrator on a perceived ambiguity in a contract created by external events.[30] Indeed, the First Circuit acknowledged that "the arbitrator never explicity construed the contract." Absent such a ruling, the proper course was for the district court to remand the matter to the arbitrator for a determination on whether ambiguities in the contract existed and to resolve those ambiguities, if any. By failing to address the absence of a definitive ruling by the arbitrator and the recognized contravention of the contract terms on when an award was to be effective, the First Circuit clearly misapplied the teaching of this Court in *Misco*.[31]

In summary, the First Circuit's decision represents a radical departure from established Supreme Court precedent. Moreover, the First Circuit's decision is in conflict with the established law of several other circuit courts of appeal, and, accordingly, review by this Court is warranted. Indeed, AAI respectfully submits that the decision is so clearly erroneous and so clearly at odds with established legal principles that this Court may reverse simply on this petition and any response thereto without the need for further briefing and

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exceeded its jurisdiction and failed to comply with the requirements of the Act.)

[30] As discussed in Part II, *infra*, the courts below violated the well-settled principles of contract interpretation in their effort to provide a rationale to the decision. If an ambiguity is found to exist (an issue of law), resolution of the ambiguity is for the finder of fact. In this case, the fact-finder is the arbitrator. The teaching of *Misco* is consistent with this principle. The decisions below are not.

[31] Indeed, the course of remand dictated by *Misco* is consistent with summary judgment standards, and following that decision would have obviated the perceived need by the First Circuit to not apply the correct summary judgment standards. *See Part II, infra.* It also would have avoided the court's paradoxical position that the award did not conform to the contractual mandates, as construed by the court, on when the award was to be effective (December 1), but, nonetheless was to be enforced. (App. A, 955 F.2d at 94).

argument. *Prairie Constr. Co. v. Operating Engineers*, 425 U.S. 800 (1976).

II.

THE DECISION OF THE FIRST CIRCUIT FAILS TO FOLLOW THIS COURT'S MANDATES CONCERNING PROPER SUMMARY JUDGMENT STANDARDS AND VIOLATES THE FUNDAMENTAL PRINCIPLES OF CONTRACT INTERPRETATION.

In addition to contorting the clear and concise language in the contract, the First Circuit found it necessary to acknowledge that it was disregarding the legal standards for summary judgments promulgated by this Court. This clearly contravenes the requirement of Rule 56 of the Federal Rules of Civil Procedure and this Court's decisions interpreting Rule 56.

In a trilogy of cases, this Court addressed and clarified the standards by which a district court (and subsequently an appellate court) should consider a motion for summary judgment, as well as the burdens placed on both the moving and non-moving parties. According to this Court, a party opposing a properly supported summary judgment motion "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Matshushita Industrial Co., Ltd. vs. Zenith Radio Corp.*, 475 U.S. 574 (1986). Moreover, the record must be viewed in the light most favorable to the party opposing the motion for summary judgment and the court must indulge all inferences in favor of the non-moving party. *Celotex Corp. vs. Catrett*, 477 U.S. 317 (1986). The teachings of these decisions established that a reviewing court must grant all inferences in favor of a non-moving party.

As the non-movant in this case, AAI was entitled to have all inferences granted in its favor. However, the record clearly demonstrates that the district court created and construed the alleged ambiguity *against* AAI. In affirming the

district court's judgment, the First Circuit also failed to grant inferences in favor of AAI in disregard of well-established standards for summary judgment proceedings. Specifically, the First Circuit stated that "the ordinary analysis of motions under F.R.C.P. 56 is not particularly helpful . . . " (App. A, 955 F.2d at 94). Had the courts below heeded the Act's and *Misco's* directive, there would have been no need to fracture the well-established standards of Rule 56. The erroneous failure to remand to the arbitrator does not excuse the compounded failure to adhere to this Court's summary judgment standards. Indeed, the teachings of *Misco* and authority interpreting the Act are consistent with the Court's summary judgment standards and those holdings are implicitly grounded on their foundation. If an ambiguity is perceived, remand to the fact finder is required.

Misco and Rule 56 standards in this context are also firmly embedded in the fundamental cannons of contract interpretation. Whether a contract is ambiguous (or whether an award is inconsistent with the contract) is an issue of law for the courts. 4 *Williston on Contracts*, § 601. However, once that determination is made (and here it is clear that the courts below acknowledged the issue of retroactivity was not submitted to nor decided by the arbitrator), its resolution is for the fact finder in the first instance. *Id.; Etting v. Bank of the United States*, 24 U.S. 59, 6 L.Ed. 419, 423 (1826). The fact finder in this case is Arbitrator Moore and remand is required. The failure to do so was contrary to *Misco, Celotex* and other decisions of this Court, and, thus, clear error.

At this time, there is an opinion of the First Circuit Court of Appeals that stands for the proposition that this Court's decisions allocating the burdens of proof in summary judgment proceedings need not be followed; that *Misco's* and the Act's directives may be ignored, and that the well-settled legal principles concerning ambiguous contracts are simply not applicable. Consequently, AAI respectfully submits that Certiorari is clearly warranted in this case and this Petition should be granted.

III.

CONCLUSION

Based upon the foregoing, Petitioner Aviation Associates, Inc., respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

FULBRIGHT & JAWORSKI

By _____

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APPENDIX A

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Plaintiff, Appellee,

v.

AVIATION ASSOCIATES INC., d/b/a
SUNAIRE EXPRESS,

Defendant, Appellant.

NO. 9-653.

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

Heard Nov. 5, 1991.

Decided Jan. 28, 1992.

Rehearing and Rehearing En Banc
Denied Feb. 24, 1992.

A. J. Harper, II with whom Teri L. Danish, Fulbright & Jaworski, Houston, Tex., and Lawrence E. Duffy, San Juan, P.R., were on brief for Aviation Associates, Inc.

Suzanne L. Kalfus with whom Gary Green, Elizabeth A. Ginsburg, Washington, D.C., Ginoris Vizcarra de Lopez-Lay and Lopez-Lay & Vizcarra, Santurce, P.R., were on brief for Air Line Pilots Ass'n Intern.

Before CAMPBELL, Circuit Judge, BOWNES, Senior Circuit Judge, and SKINNER,* District Judge.

SKINNER, District Judge.

This appeal is from a summary judgment of the district court enforcing an arbitrator's award. It requires us to consider the effect of one of the minor derangements caused by "Hugo," a fierce hurricane which devastated the Virgin Islands and Puerto Rico in September 1989.

Air Line Pilots Association International ("AAI"), the defendant-appellant. Labor relations between the parties are governed by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

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* Of the District of Massachusetts, sitting by designation.

by virtue of § 187 thereof.[1] Under the April, 1989 collective bargaining agreement between ALPA and AAI's parent company, wages and other conditions of employment of the AAI pilots were to be negotiated separately, and if negotiations failed, they were to be submitted to binding interest arbitration.

Negotiations did indeed fail, and in July of 1989 the parties selected Preston J. Moore as the sole arbitrator. The parties agreed to begin hearings on September 25, 1989, on St. Croix, but the destruction wrought by the hurricane made it impossible to hold hearings as scheduled. ALPA suggested moving the hearing to another location, but AAI wished to continue it to another time. There was a further delay, apparently due to the unavailability of one of AAI's witnesses. ALPA consented to these delays but advised counsel that it was its position "that any award should be retroactive to compensate for the delays," according to the affidavit of James L. Dabney, the contract administrator for ALPA. Further, "AAI's representative acknowledged [ALPA's] position, but did not express agreement or disagreement." This view of these communications is contested in the affidavit of A.J. Harper II, the chief negotiator for AAI, who gives the following account:

> Rather, ALPA's only comment to counsel for AAI — but not the arbitrator — was that it might seek to have the arbitrator make a retroactive award to compensate for the delay in the holding of the hearing. I advised ALPA that it was free to present the issue to the arbitrator if it so desired. It did not do so until its post hearing brief.

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[1] The parties have ignored the provisions of § 157 and § 159, but these provisions may be waived by the parties. Compliance with the statute is not a prerequisite to the exercise of jurisdiction by the district court. *Kreiter v. Lufthansa German Airlines, Inc.*, 558 F.2d 966 (9th Cir. 1977).

Eventually the hearing was held in San Juan, Puerto Rico, on December 18 and 19, 1989. Difficulty in obtaining the transcript of the hearing caused additional delay. The arbitrator issued his decision on March 7, 1990, awarding pay increases to the employees represented by ALPA, among other things. The issue of retroactivity was not considered during the hearing, and was called to the arbitrator's attention for the first time by ALPA's post-hearing brief:

> Additionally, The Association submits that new pay rates should be effective April 13, 1989, the date that the collective bargaining agreement was signed.
>
> In no case should new pay rates be effective later than October 15, 1989 — the end of the 180 period [*sic*] that the parties set out in Article 1 for resolution of remaining open items and receipt of an arbitrator's award.

On March 7, 1990, the arbitrator issued his decision, making the new pay rates retroactive to October 15, 1989. He noted the delay in the proceedings with the following comment:

> None of the above is the fault of either party but is simply noted for the reason that the parties had agreed this matter should be resolved within 180 days as was set out in Article 1 of the resolution of the open items and receipt of the arbitrator's award.

In Article 1(b) of the collective bargaining agreement, which established the arbitration procedure, the last two sentences are devoted to timing:

> The intent of this provision is that a decision shall be issued within one-hundred-eighty (180) days after date of acquisition or start-up. Any award shall be effective on the first day of the next month period which starts thirty (30) days after issuance and shall run concurrently with the duration of this agreement.

Upon receipt of the arbitrator's decision, counsel for AAI wrote the arbitrator on March 16, 1990, that the retroactive application of the new pay rates violated the second quoted sentence of Article 1(b) and requested that the award be modified so that the pay rates would become effective on May 1, 1990. ALPA had received a copy of this letter on March 20 but had not replied by March 25. On March 25, 1990, the arbitrator issued an amended award, making the new pay rates effective on May 1, 1990.

On March 30, 1990, ALPA wrote the arbitrator that the original award was final and binding, that once the award issued the arbitrator became *functus officio* and that the amendment must be rescinded. On April 2 the arbitrator replied to ALPA that he now considered the amendment to be invalid and improper. He withdrew the amendment and reinstated the original award. AAI refused to pay the new rates for any period prior to May 1, 1990, however, and ALPA brought this action in the district court of Puerto Rico to enforce the original award. The district court allowed ALPA's motion for summary judgment and ordered AAI to pay the new wage rates retroactively as required by the award. AAI appeals from that judgment.

Summary judgment is clearly an appropriate mode for the resolution of an action to enforce an arbitrator's award. The ordinary analysis of motions under Fed.R.Civ.P. 56 is not particularly helpful, because the enforcement proceeding is by nature summary. Disputes of fact should have been resolved by the arbitrator, and may not be addressed by the district court, even if the court is convinced that the arbitrator committed serious error. *See United Paperworkers International v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987).

The district judge ruled that the timing provisions of the collective bargaining agreement, while originally unambiguous, had been rendered ambiguous by events. In his view the arbitrator had resolved the ambiguity reasonably, and according to *Misco, supra*, ALPA was entitled to a judgment enforcing the award.

An award, even though reasonable, is not automatically entitled to enforcement. An award should not be enforced if is tainted by fraud or corruption, *see Misco*, 484 U.S. at 38, 108 S.Ct. at 371, if the contract itself contravenes public policy, *see id.* at 42, 108 S.Ct. at 373 (citing *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983)), or if the arbitrator exceeds his authority, *see Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 944 (1st Cir. 1988) (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960)). The first two conditions do not apply to this case, but AAI contends that the arbitrator had no authority to order retroactive application of the award because the agreement contained no ambiguity.

The authority of an arbitrator is derived from the agreement of the parties. *See Strathmore Paper Co. v. United Paperworkers Int'l Union*, 900 F.2d 423, 426 (1st Cir.1990); *Georgia-Pacific*, 864 F.2d at 944. No question of retroactivity appears in the underlying agreement in this case because it was contemplated that the arbitration would proceed according to schedule. As the district judge correctly observed, however, while the original language was facially unambiguous, an ambiguity was created by subsequent events. There was, moreover, a subsequent understanding between the parties that the issue of retroactivity could be presented to the arbitrator. Paragraph 7 of the affidavit of

A.J. Harper II, the attorney for AAI, recites the following exchange:

> Rather, ALPA's only comment to counsel for AAI — but not the arbitrator — was that it might seek to have the arbitrator make a retroactive award to compensate for the delay in the holding of the hearing. *I advised ALPA it was free to present the issue to the arbitrator if it so desired.* It did not do so until its post hearing brief. [Emphasis supplied.]

Clearly the parties contemplated raising the issue of retroactivity before the arbitrator. Furthermore, in his letter to the arbitrator of March 16, 1990, Attorney Harper refers to the arbitrator's "retention of jurisdiction" for the purpose of correcting the effective date. AAI is, at the very least, estopped to deny jurisdiction in view of Attorney Harper's statement and subsequent letter. We rule that under these circumstances, the arbitrator had the authority to resolve any ambiguity in the contract language and render a decision on the retroactive application of his award.

AAI argues, however, that there was no ambiguity because the thirty day provision is stated in mandatory terms ("Any award shall be effective . . . [etc]"), while the 180 day provision is cast in terms of the intent of the parties. Hence, the thirty day provision is controlling. The assignment of relative importance to these two sentences, however, is for the arbitrator in the first instance. *See International Brotherhood of Electrical Workers, Local 1228 v. WNEV-TV. New England Television Corp.*, 778 F.2d 46, 48 (1st Cir.1985). Intent of the parties is, after all, a principal criterion in the construction of contracts. *See, e.g.*, Restatement (Second) of Contracts § 202(1).

In this case, the arbitrator arrived at his several determinations of effective date without the benefit of a hearing. Even given the desirability of a retroactive date, October 15, 1989 does not fit APLA's theory that one should

assume that the decision was rendered on the last day of the 180 day period. Under Article 1(b) award would still not be effective until "the first day of the next month period which starts thirty (30) days after issuance," i.e., December 1, 1989. As far as the record shows, the arbitrator never explicitly construed the contract or took testimony concerning the intention of the parties as evidenced by their communications prior to the hearing in December 1989.

In our opinion, however, the arbitrator did rule on retroactivity, albeit without a great deal of consideration and, as to the six-week discrepancy between October 15 and December 1, 1989, in apparent disregard of Article 1(b). Since we are not dealing with an omission or refusal to make a finding, or with "uncertainty," 45 U.S.C. § 159(c), we are required by the imperatives of *Misco, supra,* to affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

United States Court of Appeals

FOR THE FIRST CIRCUIT

NO. 91-1653

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Plaintiff, Appellee,

V.

AVIATION ASSOCIATION, INC., D/B/A SUNAIRE EXPRESS,

Defendant, Appellant.

Before

BREYER, *Chief Judge,*
CAMPBELL AND BOWNES, *Senior Circuit Judges,*
TORRUELLA, SELYA AND CYR, *Circuit Judges,*
AND SKINNER,* *District Judge.*

ORDER OF COURT

Entered: February 24, 1992

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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* Of the District of Massachusetts, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

APPENDIX C

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Plaintiff

v.

AVIATION ASSOCIATES, INC., d/b/a
EASTERN METRO EXPRESS,

Defendant.

CIV. NO. 90-2055 GG.

UNITED STATES DISTRICT COURT,
D. PUERTO RICO.

March 28, 1991.

Gary Green, Elizabeth Ginsburg, Washington, D.C., Ginoris Vizcarra De Lopez-Lay, Santurce, Puerto Rico, for plaintiff.

A.J. Harper, II, Houston, Tex., Lawrence E. Duffy, San Juan, Puerto Rico, for defendant.

OPINION AND ORDER

GIERBOLINI, District Judge.

The issue before the court is the proper role of labor arbitrators in resolving issues submitted for arbitration. Specifically, we must determine whether the arbitrator in the instant case acted beyond his authority in making an award retroactive.

I. BACKGROUND

Plaintiff Air Line Pilots Association International ("ALPA") brought this action to enforce an arbitration award against Aviation Associates, Inc., pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ALPA is the labor organization designated for collective bargaining purposes as the exclusive representative of the pilots employed by

defendant Aviation Associates, Inc. ("AAI"), an airline operating company.[1] ALPA has filed a motion for summary judgment which argues that the award was properly made retroactive by the arbitrator. Defendant opposes plaintiff's motion and has filed a cross-motion for summary judgment which argues that in making the award retroactive, the arbitrator exceeded his contractual authority, or alternatively, that the issue of retroactivity was outside the issues submitted for resolution. For the reasons stated below, we grant plaintiff's motion for summary judgment.

II. SUMMARY JUDGMENT

In determining whether summary judgment is appropriate, the court must view the record in the light most favorable to the party opposing the motion, and indulge all inferences favorable to that party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 633-34 (1st Cir.1990); *Amsden v. Moran*, 904, F.2d 748 (1st Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 713, 112 L.Ed.2d 702 (1991). Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R. Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Brennan v. Hendrigan*, 888 F.2d 189, 191 (1st Cir.1989).

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) establishes that the party moving for summary judgment has the initial burden of showing "the

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[1] AAI is a subsidiary of Metro Airlines, Inc.

absence of a genuine issue concerning any material fact." *Id.* at 159, 90 S.Ct. at 1609. If the movant shows that there is an absence of evidence to support the non-moving party's case, the burden shifts to the non-movant to establish the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.[2] The materiality of a fact is determined according to the substantive law that governs the dispute. A fact is material only if it affects the outcome of the suit. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. A material fact creates a genuine issue for trial "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248, 106 S.Ct. at 2510.

In deciding ALPA's motion for summary judgment, we examine the facts in the light most favorable to the non-moving party, in this case, AAI. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 633-34 (1st Cir.1990); *Roy v. Augusta*, 712 F.2d 1517 (1st Cir.1983). Applying this standard, and after an extensive review of the record, and according the non-moving party the indulgence required, we find that AAI has not presented specific facts showing a genuine issue for trial. *Medina Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990); *Garside v. Osco Drug, Inc.*, 895, F.2d 46, 48 (1st Cir.1990).

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[2] *See generally* Louisell, Hazard & Tait, *Cases and Materials on Pleading and Procedure: State and Federal* 170 (6th ed. 1989) ("[A]s the Court stated in *Celotex*, the nonmoving party does not necessarily have to produce evidence in a form that would be admissible at trial. And, as the *Adickes* Court said, the nonmoving party does not have to adduce evidence at all until the moving party satisfies its initial burden of showing the absence of a genuine issue of fact").

III. FACTS

ALPA and AAI negotiated and executed a collective bargaining agreement governing certain terms and conditions of employment for, among others, the AAI pilots. In a separate Letter of Agreement (the "Side Letter"), ALPA and AAI agreed to negotiate separately wage rates, scheduling and bidding rights, training and other economic benefits. In the event that those negotiations failed to result in an agreement. ALPA and AAI agreed to submit the unresolved issues to final and binding arbitration.

The Side Letter provides:

> 1. Within ten (10) days subsequent to the signing of the Agreement representatives of the Company and Association shall meet to negotiate a side letter agreement containing exceptions to the basic Agreement which shall apply to the operations of Aviation Associates, Inc. only. Such exceptions shall be limited to necessary modifications of Articles 5, 6, 10, 12 and 20 and shall be limited to aircraft of less than fifty-one (51) seats.
>
> 2. In the event no agreement is reached within ten (10) days of the commencement of negotiations, either party hereto may invoke final and binding arbitration of the unresolved issues. The selection of the neutral and subsequent arbitration, decision and implementation shall take place as set forth in Article 1, Section 6(a) and (b) of the Agreement.

Article 1, section 6(b) referred to in the Side Letter is the relevant arbitration clause of the Basic Agreement. It provides:

> In the event that the parties do not reach agreement within one-hundred-twenty (120) days of the start of negotiations, the parties agree that all open issues shall be determined by final and binding arbitration . . . The arbitrator shall have the authority, in

> consultation with the parties, to establish procedural rules for an expeditious hearing and decision upon the issues . . . The intent of this provision is that a decision shall be issued within one-hundred-eighty (180) days after date of acquisition or start-up. Any award shall be effective on the first day of the next month period which starts thirty (30) days after issuance and shall run concurrently with the duration of this Agreement.

In May and June 1989, the parties held negotiations, but eventually reached an impasse. In accordance with the Side Letter, the parties selected an arbitrator, Preston Moore, and scheduled a hearing on September 25, 1989 in the Virgin Islands. With the advent of Hurricane Hugo, the hearing had to be postponed. It was finally held in San Juan on December 18 and 19.

During the hearing the question of when the award should become effective did not arise. The issue of retroactivity was first raised by ALPA in a post-hearing brief. ALPA requested that the new rates to be set by Arbitrator Moore be made retroactive to October 15, the last day of the 180-day period of negotiation and arbitration contemplated by Article 1, Section 6 of the Basic Agreement. AAI did not respond to ALPA's retroactivity argument.

Arbitrator Moore issued his decision on March 7, 1990. The Arbitrator ruled on the various pay-related issues and with respect to the effective date of the award, he noted that the resolution of the matters in controversy had been delayed by Hurricane Hugo and the court reporter's failure to present the transcript to the parties in a reasonable period of time. Presumably relying on the argument made in ALPA's post-hearing brief, Arbitrator Moore ruled that the new pay rates be made retroactive to October 15, 1989.

Upon receipt of the award, AAI promptly wrote to the Arbitrator stating that insofar as the award made retroactive

the pay rates, it was contrary to the provisions of Article 1, Section 6(b) of the Collective Bargaining Agreement. AAI requested the Arbitrator to modify the award to be effective beginning May 1, 1990. Ten days later, Arbitrator Moore issued a purported amendment to the award, reversing his decision on retroactivity and setting May 1, 1990, as the effective date of the award. Upon ALPA's objection to the amendment, Arbitrator Moore held the amendment invalid and improper.

AAI refused to implement the retroactive portion of the award and this suit followed.

IV. ANALYSIS

We begin by noting that the Arbitrator's decision constitutes a reasonable interpretation of two conflicting provisions in Article 1, section 6(b) of the Basic Agreement. These two conflicting statements follow each other. The parties contended that an arbitral decision on these matters would "be issued within one hundred-eighty (180) days . . . " And "[a]ny award shall be effective on the first day of the next month period which starts thirty (30) days after issuance . . . " Art. 1, Sec. 6(b).

In the instant case, the Arbitrator interpreted this provision in the Collective Bargaining Agreement as setting the effective date for the award to commence at the expiration of the 180 days.

Arbitrators have to interpret contracts submitted for their resolution and we must give substantial deference to their interpretation. *United Steelworkers v. American Mfg.*, 363 U.S. 564, 568, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960) ("[T]he courts, therefore, have no business . . . determining whether there is particular language in the written instrument which will support the claim."). The issue in this case is not whether Arbitrator Moore rendered the most correct

or reasonable decision on the issue of retroactivity, but whether his decision constitutes a manifest error of law or a gross error of fact. *Maine Cent. R. v. Broth. of Maintenance of Wary Emp.*, 663 F.Supp. 425, 429 (D.Me.1987) (citations omitted). The narrow scope of judicial review of labor arbitration awards is designed to further the federal policy of resolving labor disputes by arbitration. *Misco*, 484 U.S. at 36, 108 S.Ct. at 369 (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)).

The Supreme Court has used sweeping language to describe the role of arbitrators in resolving disputes like the one in question. In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29,108 S.Ct. 364, 98 L.Ed.2d 286 (1987), the Court held that "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." 484 U.S. at 38, 108 S.Ct. at 371. "It is a firm principle of federal labor laws that where parties agree to submit a dispute to binding arbitration, absent unusual circumstances, they are bound by the outcome of said proceedings." *Posadas de Puerto Rico Ass'n, Inc. v. Asociación de Empleados de Casino de Puerto Rico*, 821 F.2d 60, 61 (1st Cir.1987).

AAI contends that the award exceeded the Arbitrator's contractual authority and it should not be enforced as to its retroactive effect. We disagree. The language of Article 1, Section 6(b) as to when the award is to be effective seems on the surface clear and unequivocal. However, this case shows that even clear and unequivocal language may become ambiguous under certain circumstances. Due to Hurricane Hugo and the delay by the court reporter, the resolution of those matters went beyond the 180-day limit prescribed

under Article 1, Section 6(b). Although AAI interpretation of the language of Section 6(b) may be correct, we find that the language of Section 6(b) under the circumstances of this case is ambiguous. We hold that Arbitrator Moore's interpretation of the award to have a retroactive effect to October 15, 1989 is more than plausible. *United States Postal Serv. v. National Ass'n of Letter Carriers*, 789 F.2d 18, 20 (D.C.Cir.1986); *Hughes Aircraft Co. v. Electronic & Space Technicians Local 1553*, 822 F.2d 823, 826 (9th Cir.1987). It was reasonable to respect the bargained for provision stating that the parties' intent was to ensure a decision of disputed matters within 180 days. *See Berklee College of Music v. Local 4412*, 858 F.2d 31 (1st Cir.1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989) (Arbitrator's interpretation that untimeliness of a grievance filing was *de minimis* is not unreasonable).

Alternatively, AAI contends that retroactivity of the award was not one of the issues presented for decision. We think AAI's contention gives more importance to labels than to logic. As the Ninth Circuit has stated: "[I]f the evidence before the Court for purpose to exclude a particular claim from arbitration is not sufficiently forceful, the result . . . is that the answer has been found and that the underlying dispute is arbitrable." *Communications Workers v. Pacific Northwest Bell Tel. Co.*, 337 F.2d 455, 459 (9th Cir.1964). The fact retroactivity was not *explicitly* submitted for resolution does not mean that retroactivity was not clearly before the Arbitrator. The Arbitrator had a duty to construct the agreement and decide when the award become effective. *See John Wiley & Sons v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 918, 11 L.Ed.2d 898 (1964) ("procedural questions which grow out of a dispute and bear on its final disposition should be left to the arbitrator.") Indeed, AAI should have

raised the issue of retroactivity after ALPA had argued for it in its post-hearing brief.

V. CONCLUSION

We think that the parties could have used different language to avoid drawing the conflicting interpretation that Article 6, Section b manifest. *Berklee College of Music*, 858 F.2d at 33. The following language would have made the provision less ambiguous: "The intent of this provision is that a decision upon the issues be issued within one-hundred-eighty (180) days . . . [Notwithstanding the above], [a]ny award shall be effective on the first day of the next month period which starts thirty (30) days after issuance . . . " Article 1, section 6(b) contains no such express constraint on the authority of the arbitrator to interpret it.

In short, Arbitrator Moore's decision on the issue of whether the award should be effective retroactively is not unfounded in reason and fact or "mistakenly based on a crucial assumption which is 'concededly nonfact,' " *Bettencourt v. Boston Edison Co.*, 560 F.2d 1045, 1050 (1st Cir.1977) (citation omitted). As the Supreme Court recently stated "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Misco*, 484 U.S. at 36, 108 S.Ct. at 370.

For the foregoing reasons, AAI's cross motion for summary judgment is hereby DENIED. ALPA's motion for summary judgment is hereby GRANTED. The clerk shall enter judgment accordingly.

SO ORDERED.

APPENDIX D

ARBITRATION OPINION AND AWARD

In the Matter of the Arbitration between	§	
AVIATION ASSOCIATES, INC. and AIR LINE PILOTS ASSOCIATION	§	RE: INTEREST ARBITRATION

APPEARANCES

A. J. HARPER II, for the Company
BRUCE A. YORK, for the Union

BACKGROUND

The parties to this proceeding — Metroflight, Inc., Metro Express, Inc., Chaparral Airlines, Inc. Aviation Associates, Inc. and the Air Line Pilots Association, International — signed a new collective bargaining agreement on April 13, 1989 after lengthy negotiations. The parent of these airline subsidiaries, Metro Airlines, Inc., also agreed to be bound by the provisions of the Red Book "as if references to 'Company' read Metro Airlines, Inc."

During these negotiations the parties were unable to agree on all contractual provisions for AAI, the company subsidiary providing air services in the Caribbean. They therefore executed contemporaneously the Aviation Associates Exceptions Letter of Agreement. This letter established a procedure for negotiation and then arbitration of all remaining issues.

POSITION OF THE COMPANY

The Company takes the position that the decision regarding each of the issues involved is controlled by the standard set forth in Article 1, Section 6(b) of Joint Exhibit No. 1. The Company points out the relevant portion thereof reads as follows:

> "Articles 5, 6, 10, 12 and 20 shall not be applicable . . . The arbitrator shall take into account and must base the decision upon average competitive conditions in the geographic area for wages and working conditions for comparable operations . . ."

The Company urges that above standard is expressly made applicable to this case by virtue of the "Aviation Associates Exceptions Side Letter," paragraph 2, which provides:

> "The . . . arbitration, decision and implementation shall take place as set forth in Article 1, Section 6(a) and (b) of the Agreement."

The Company points up that Metro is a holding company and is not an air carrier. The Company urges it currently owns six separately incorporated operating companies, each of which has its own D.O.T. operating certificate, separate FAA approved manuals and separate management. The Company alleges that each operating subsidiary is separately and independently responsible for its own costs and operations. Management notes that FAA approved manuals of each is distinct and different, and two of the operating subsidiaries are not parties to, and pilots of these operations have no rights under the Agreement.

The Company notes that AAI is in a "hybrid" position in that it is a party to a part of the Agreement but is not covered by several of its provisions, *i.e.*, Articles 5, 6, 10, 12 and 20 are not applicable to AAI.

AAI recognizes that much of the dispute and evidenciary debate centers on the appropriate standards to be applied for

the decision. AAI urges that Article 1, Section 6 is unambiguous and the standard to be used in reaching a decision is clear. AAI notes that the arbitration is occurring pursuant to Paragraph 2 of the Side Letter, which expressly incorporates Article 1, Section 6(A) and (b). AAI urges that the testimony and ALPA Exhibits No. 1 and 2 support the fact that the standard is clear and unambiguous. On the basis AAI contends that the arbitrator must base his decision upon the "average competitive conditions in the geographic area for wages and working conditions for comparable operations."

In this regard AAI notes the standard defines the basis for comparison and decision as being "average competitive conditions" and defines the specific segment of the industry to be used (comparable carriers), the geographical area to be considered (the Caribbean area where AAI operates) and the comparators to be used (wages and working conditions).

In this context AAI urges that an agreement is not ambiguous if the arbitrator can determine its meaning without any other guides and a knowledge of the simple facts on which its meaning depends. AAI urges the issue is not ambiguity in the contractual standard but is the application of that standard to the evidence which is involved. AAI urges that neither cost-of-living factors nor profitability factors are included in the contractual standard. Rather it is urged the evidence as to wages and working conditions of AAI's competitors, and what that evidence established as the average competitive conditions should govern the resolution of this case.

AAI contends that much of the data contained in ALPA's Exhibits No. 4, 5, 7 and 8 concerning carriers operations in locations other than the Carribean is not probative evidence of the issue presented, and that data such as that contained in ALPA Exhibits No. 9, 10, 11 and 12 is not provative evidence of the issue presented for decision. AAI also notes

that ALPA Exhibits No. 6 and 17 appear to be designed to indicate that Metro can afford the cost of increasing the block rates of AAI pilots to those set forth in Joint Exhibit 1 (Article 3). Management notes it is AAI, not Metro, that would pay the cost, and secondly the amount of costs involved represents an increase of over 50 percent of AAI's current crew costs. On that basis the Company contends there is simply no justification or evidentiary basis to justify their claims.

AAI also notes that ALPA Exhibits 18 through 20 propose to measure cost-of-living differentials between San Juan-St. Croix and Dallas-Atlanta. AAI contends that even assuming arguendo that the total accuracy of the data as presented is correct, such is not relevant to the issue presented for decision. The Company alleges that the cost-of-living differentials and stateside rates of pay are not the measure for a decision.

I. REPOSITIONING PAY ISSUE:

AAI notes that AAI pilots reposition aircraft at San Juan by taxing from customs (after deplaning passengers) to the passenger departure gate. It is noted that under the collective bargaining agreement Article 2, "block-to-block" is defined as movement of the aircraft "for the purpose of flight." The Company alleges that Article 5, Section 1 limits flight pay to "scheduled block-to-block hours only." The Company recognizes that ALPA seeks to modify these provisions by including aircraft repositioning for pay purposes.

AAI contends that the evidence establishes that repositioning occurs without flight pay at other companies covered by Joint Exhibit No. 1. Management recognizes that such is not with the same frequency. Also AAI alleges that the data available from competitive carriers in the geographic area does not support a claim for repositioning pay. AAI notes

that ALPA presented no evidence that any competitive carrier pays repositioning pay.

II and III. FLIGHT PAY FOR CAPTAINS AND FIRST OFFICERS:

AAI alleges that wages and working conditions in this industry are tied together. The Company points to evidence that a spectrum of wages and working conditions (scheduled days available for duty, etc) exists among the various carriers. AAI alleges that the approach used by ALPA carries a risk of magnified distortion since it enhances the block rate for carriers whose scheduled flight hours covered by the guarantee are higher, *e.g.*, (Crown Air and Windward), but it debases the block rate for carriers whose guaranteed hours are lower (*e.g.* Air Anguilla and Aero Virgin Island). Further it is urged that such is an artificial measure, at best, in the case of carriers whose salary guarantees turn on days of duty (*e.g.* Executive Air, Flamenco and Virgin Air).

The Company submits that to obtain a truer, more accurate measure, the various pay systems must be converted to a common base on a demonstrable, objective bases. AAI alleges that its methodology utilized in Exhibit A in their brief is appropriate, since where assumptions or proxys are used, they are identified and the basis therefore stated. It is urged the resulting figures show comparable data based on AAI's guarantee and duty day availability. It is noted that Executive Air guarantees 8 to 10 days off per month, and Virgin Air requires 5 days of work per week, and those who require less days or less hours pay less. It is noted for example that Flamenco requires only 15 days of work per month but pays only $1,200.00. AAI notes that it guarantees pay for 80 hours and has agreed it will schedule pilots for an average of 10 days per month. On that basis it is urged the arbitrator must establish block rates balanced by those considerations. Also in establishing block rates, AAI suggests

that the crew cost must be considered. On that basis AAI urges the total crew cost should remain comparable.

AAI further notes that longevity must also be considered. It is noted that Executive Air caps increases at three years; Virgin Air caps at two years; Flamenco provides no longevity increases; and Windward extends out to ten years and Crown extends for six years. In view of the above considerations AAI contends the Company is clearly within the average competitive conditions among the competing carrier in the Caribbean.

IV. BLOCK RATES FOR LONGEVITY INCREMENTS:

AAI contends that Captain's rates should be based on time in grade since this represents the average wage and working conditions existing at the predominant number of comparable operations in AAI's geographical area.

V. WHAT PORTION OF HEALTH AND LIFE INSURANCE PREMIUMS ARE TO BE PAID BY THE COMPANY:

AAI again contends that this request of ALPA should be denied and that AAI's current practice awarded (50 percent of premiums Company paid for pilot only) since it reflects the average wage and working conditions of comparable carriers in AAI's market area.

VI. CROSS BIDDING:

AAI alleges that the potential implications of and the impact on safety of costs to AAI is substantial. It is urged there is no evidence of cross bidding being allowed in AAI's geographical area of operations. It is pointed out that none exists as to any other Caribbean commuter air carrier. It is noted that it does not exist as between or among all Metro

operating subsidiaries. The Company urges there is no evidentiary justification for finding it proper as to AAI. Management alleges the provisions authorizing cross bidding are among those explicitly excluded from application to AAI and open before the arbitrator. The Company suggests the burden of proof is upon ALPA in order for the arbitrator to grant cross bidding.

AAI alleges that cross bidding carries several large negatives which directly impact its operation. It is noted that cross bidding would really only be applicable to Captains since First Officers generally have low flight time and could not meet the minimum total flight time qualifications required under the operating manuals of the other operating companies.

AAI notes that cross bidding has a direct cost impact on the Company in that it must replace the departing pilot and must train the replacement. It is noted that a cross bidding pilot for training purposes is treated as a new-hire.

POSITION OF THE UNION

ALPA points up that prior to commencement of arbitration the parties executed the Aviation Associates Side Letter (Joint Exhibit No. 2). It is urged this agreement should not be confused with the Aviation Associates Exceptions agreement found at the back of the Red Book which acknowledges that "the parties have reached agreement on certain necessary exceptions to the collective bargaining agreement and contemporaneous side letters of agreement." The Union alleges the necessary exceptions include, among other things, provisions granting the Company added flexibility in the area of training, crew scheduling, bidding, construction of lines, sick leaves and many more. Also the Association alleges AAI's Side Letter lists the six issues which remain open for resolution by the arbitrator.

The Association notes the negotiations for the working agreement continued for three or four years. The Association urges that Pilots' negotiating efforts centered around two issues, pay and scope protection. In the area of scope the Pilots contend they wanted to include all of Metro Airlines' subsidiaries and newly acquired companies under one collective bargaining agreement, and many scope proposals and counter proposals were made by each side.

ALPA urges that particularly relevant to this arbitration are two Company proposals, i.e., the Company proposal dated November 7, 1989 and the Company proposal dated December 9, 1989. It is urged both proposals sought to narrow the contractual standard used in this case, and thereby limit the arbitrator's discretion to fashion an award based on a comprehensive review of the data. It is pointed up that the Association rejected both proposals. It is urged that in its November 7 proposal the Company tried to cap its operating costs at the level of its competitors.

The Association also points up that the parties signed a Letter of Agreement dealing specifically with AAI and this arbitration on April 13, 1989 and such letter entitled Aviation Associates Exceptions letter of agreement states in relevant part:

> "the parties acknowledge that certain exceptions to the provisions of the Agreement are necessary for the success of the operations of Aviation Associates, Inc., . . . Such exceptions shall be limited to necessary modifications of Articles 5, 6, 10, 12 and 20 and shall be limited to aircraft of less than 51 seats."

ALPA contends that by any measure Metro has been one of the stars of the regional industry. In this regard ALPA points up that Air Transport World and National Aviation Weekly ranked Metro Airlines first in the country based on

passengers carried. It is further pointed up that the Company's annual report corroborates industry observers.

ALPA also points up that with the exception of AAI Metro Airlines pilot compensation has, like the Company's performance, been at the top of the regional industry. It is urged that Metroflight, Metro Express, Chaparral and Metro Northeast have the highest pay in the regional industry for five year Captains flying 19 seat equipment. It is also urged that the same holds true for First Officers' hourly pay at Metro Airlines. ALPA introduced charts in support of that position. ALPA points up that the pay for Captains at Metroflight, Chaparral, Metro Express and Metro Northeast is almost 55 percent higher than pay on the same aircraft for the Captains at AAI. It is also urged the same holds true for two year First Officers.

The Association contends that air carriers in the Caribbean have come and gone during the time the Company has operated but points up that the Company stated in its annual report:

> "Metro's Caribbean operations achieved record passenger boardings and operating profits during fiscal 1989 despite increased competition and uncertainties with Eastern Air Lines, Metro's affiliate at the San Juan hub."

ALPA also urges that in comparing the first half of 1989 to the first half of 1988, passenger enplanements increased on AAI, their load factor increased, and AAI's share of scheduled departures in their markets increased. ALPA further contends that AAI's available seats compared with the rest of the industry increased dramatically.

ALPA contends that pay for AAI pilots is at the bottom of the barrel for carriers operating in the Caribbean. ALPA introduced into evidence Exhibit No. 13 which indicates that Windward Captains made $33 per hour; CMR $28.05

per hour; LIAT $27.46 per hour; CRWN $25.94 per hour; EXEC $24.94 per hour; SEAPL $22.86 per hour and AAI $22.81 per hour. Also it is urged the same relation applies to First Officer pay. ALPA contends their charts compared apples to apples since they used pilot pay rates for 19 seat aircraft only. ALPA notes that all of the source material for these charts was turned over to the Company on their request.

ALPA notes no source documents were presented by the Company in their use of Exhibits No. 2 through No. 11. Also it is noted the Company used many different size aircraft as comparisons. ALPA contends that only two of the carriers the Company used as a comparison, Windward Air and Executive Air, had equipment similar to that used by AAI.

ALPA further contends that the similarity between U.S. and Caribbean carriers are very much the same and notes the rates in pay for Captains on 19 seat equipment ranges from approximately $22 per hour on the low end to approximately $33 or $34 per hour on the high end.

ALPA urges that only necessary exceptions to the Red Book should be permitted and notes that negotiations were limited to Sections 5, 6, 10, 12 and 20 of the working agreement. ALPA points up that if the parties could not resolve those issues, they agreed to invoke arbitration. The Association urges that the Aviation Associates Exception Letter of Agreement requires that the party seeking an exception from the contract must show that such change is "necessary to the success of the operation of Aviation Associates, Inc." The Association points up that the changes are limited to "necessary modifications" of the Red Book, and such is reiterated in paragraph 1 of the Letter. ALPA points up it is repeated again in the Aviation Associates Side Letter executed just before the start of arbitration in San Juan. The Association urges it is clear from the parties'

language that they wanted changes to the Red Book confined to those of demonstrated need. On that basis it is urged the arbitrator must given effect to the parties' express language and manifestations of intent.

The Association contends their interpretation of the standard is correct, but assuming arguendo that the arbitrator finds to the contrary, application of the standard found in Article 1, Section 6 to the open issues should be the next step. ALPA urges that the arbitrator must understand what the parties meant by this provision before he can apply that standard to the open issues in the case. The Union urges that this standard is ambiguous. The Association urges the terms "average competitive conditions" and "comparable operations" and "geographic area" are ambiguous. It is pointed up there is no language in the collective bargaining agreement which clarifies those phrases. Also the Association has urged there was no testimony from witnesses during the hearing on the meaning of those clauses. The Union does point up there were two negotiating proposals made by the Company and rejected by the Association which prove that the Company's anticipated interpretation is in error and the Association's version is correct.

On the above basis ALPA alleges the Company did not present evidence which supported its proposals on hourly pay, longevity pay or the costs of dependent medical insurance coverage which required necessary deviations from the Red Book. On that basis the Union urges the arbitrator should reject the Company's proposals on these issues.

I. REPOSITIONING PAY ISSUE:

The Association alleges that the proposed changes by the Association are necessary in regard to repositioning of aircraft after clearing customs in San Juan. The Association points up that difference is based upon the operation of AAI vs its mainland counterparts. ALPA points up that AAI

Pilots must drop off passengers at Customs and then reposition the aircraft to the gate, the Pilots receive no compensation for the time spent repositioning the aircraft. ALPA points up that the Company's own witness admitted this might occur six times per day.

II and III. FLIGHT PAY FOR CAPTAINS AND FIRST OFFICERS:

The Association urges that "comparable operations" means those carriers having the same type of business and flying approximately the same 19 passenger equipment. It is also urged that "geographic area" means the general geographic vicinity and not necessarily the same actual markets or city pairs. The Association contends the carriers which fall within those parameters are Windward, LIAT, Crown and Seaplane Shuttle flying Twin Otters, Comair flying 19 passenger "Metro's" and Executive Air flying 19 passenger CASA 212's.

The Association points up that AAI used Virgin Air even though they fly single pilot Piper Apaches with less than nine seats and the mail carrier Flamenco flying nine seat Islanders, and the defunct DC-3 operator Virgin Air. ALPA again stresses that the Company proposed that the arbitrator's decision could not exceed the average compensation and working conditions existing in the geographic area, and such was rejected by ALPA.

The Association points up their proposal for AAI Captains flying 19 passenger equipment should be $30 per hour for a one year Captain, $31 per flight hour for a two year Captain, $32 per hour for a three year Captain, $33 per hour for a four year Captain, and $34 per hour for a five year Captain. The Association urges all Pilots with five or more years of seniority would be paid $34 per flight hour no matter how long they have been with the Company. The Association urges this proposal falls squarely within the range of hourly

pay rates for other Captains at typical carriers in the geographic vicinity flying 19 seat aircraft. The Association has pointed to the fact that the evidence established that Captains at Windward Islands Airways flying the Twin Otter, the exact same aircraft the Company operates, are paid $33 per flight hour in their fifth year. Also the Association notes that Windward Captains continue to receive longevity pay raises through their tenth year of service. ALPA notes that the 3% to 5% increase which the Company suggests would only increase the hourly pay rates for Captains at AAI from $22.81 to $23.49 or $23.95.

The Association notes that their proposals raising the Captains' and First Officers' rates to parity with the Red Book would increase Metro Airlines' operating costs less than one-fourth of one per cent. The Association proposes that AAI First Officers be paid the same rates found in the Red Book for other Metro First Officers flying 19 passenger equipment. The Association points up that under their proposal First Officers would be paid $14 per flight hour from 0 to 6 months; $17 per flight hour from 7 to 12 months; $17.10 per flight hour from 1 to 2 years. The Association contends that the graph presented in evidence indicates that such would fall within the parameters of other typical carriers in the geographic area and what they are paying First Officers on the very same equipment. ALPA notes that second year First Officers are paid $18.56 on the Twin Otter at Windward Island Airways, $16.25 at Crown Air/Dorado Wings, and $15.90 for two year Twin Otter First Officers at LIAT.

The Association contends that the Company presented no evidence or testimony in opposition to the Association's proposal. The Association points to an award by Arbitrator James Healy wherein he held that other factors and considerations can buttress and guide the arbitrator's decision

in similar circumstances. ALPA points up that in the Western Air Lines case Arbitrator Healy stated that the arbitrator could not ignore the presence of Delta and the importance of expeditiously bringing the Western Pilots' work rules in line with those pertaining to the Delta Pilots in a feasible manner.

The Association urges it is even more compelling in the instant case since Metro Airlines bought AAI in 1985, and there have been no attempts, and certainly no expeditious attempts, to bring the AAI Pilots' work rules and pay in line with those in place for their brothers and sisters at other Metro carriers. The Association notes that both Captains and First Officers have not received a pay increase since 1985.

It is also pointed up that the cost of food, lodging and other essentials in the Caribbean is outrageous. ALPA points up that the cost of living in San Juan is 115.7 percent greater than the cost of living at Metro Airlines base in Atlanta and 120.1 percent greater than the cost of living for Metro Pilots based in Dallas.

ALPA concludes by submitting that the award should grant the new pay rates effective April 13, 1989, the date the collective bargaining agreement was signed, and in no case should become effective later than October 15, 1989 which was the end of the 180-day period the parties set out in Article 1 for resolution of the remaining open items and receipt of an arbitrator's award.

IV. BLOCK RATES FOR LONGEVITY INCREMENTS:

ALPA proposes that AAI Pilots be paid longevity pay in accordance with the provisions of Article 5, Section 6 of the Red Book. The Association notes this provision pays all other Metro Pilots longevity based on their total time with

the Company rather than their "time in grade" as a Captain like the Company proposed. ALPA alleges the evidence of record establishes it is a practice in the industry to calculate longevity in accordance with the Red Book and the Association's proposal, *i.e.*, based on a Pilot's time with the Company. ALPA urges that all of the Metro carriers and all of the carriers used in the Association's comparison of "regionals" with the exception of AAI, paid Pilots based on their total time with the Company. The Association urges that both parties had difficulty in obtaining reliable information, but the same appeared to be true for Carriers operating in the Caribbean. It is urged that at least three, and possibly five, of the carriers used in the Association's comparison of Caribbean regional carriers paid their Pilots based on time with the Company. The Association urges the evidence from the Company was to the fact that they were not aware of any company in the area calculating longevity differently than AAI, but upon cross-examination, the Company admitted they had no knowledge one way or the other as to what the practice was for other carriers in the area.

V. WHAT PORTION OF HEALTH AND LIFE INSURANCE PREMIUMS ARE TO BE PAID BY THE COMPANY:

The Association contends that the provisions found in Article 10, Section 1 of the Red Book regarding medical coverage apply equally to the Pilots at AAI. The Union has urged their proposal would appear to follow in the range of competitive conditions in the Caribbean for comparable carriers. It is pointed out that Windward Island Airways has much more generous insurance benefits than Metro Airlines has under the Red Book. It is then pointed out that Windward pays the entire cost of medical coverage, including dependents, and also Windward pilots are covered for loss of license.

The Association contends that the evidence presented by the Company is ambiguous and is inadequate. The Association urges that the Company failed to show that exceptions from the Red Book are necessary with regard to medical coverage for dependents and urges the arbitrator to award the provisions found in the Red Book for other Metro Pilots.

The Association contends that the Company apparently is proposing that AAI Pilots absorb the total cost of dependent medical coverage even after the expiration of the two year waiting period under the Red Book. The Association urges the Company has not asserted any justification for an exception from the Red Book, and further such a proposal is inconsistent with the benefits provided Pilots at the other Metro carriers and Windward Airways, which are the only companies for which adequate information was presented.

VI. CROSS BIDDING.

ALPA alleges the Company attempted to establish that a deviation from the Red Book was necessary in regard to the right of AAI Pilots to cross bid for vacancies in the Metro Airlines system. ALPA urges the estimated cost of training was much in excess of what the actual cost would be. ALPA also notes that a side letter to the Comair working agreement permitted Pilots to transfer back and forth between divisions in many circumstances. ALPA urges the Company has not demonstrated the necessity for such exceptions, and therefore they should be rejected by the arbitrator.

The Association submits this proposal would be withdrawn if the arbitrator awards the rates of pay found in the Red Book for other Metro Airline Pilots. The Association contends that if AAI Pilots are paid less than their counterparts on the same type of equipment at other Metro Airlines subsidiaries, then an exception to the Red Book is necessary to enable them to access those higher pay rates without restriction.

OPINION

This matter has been delayed by Hurricane Hugo. Hearing was originally scheduled in September but had to be postponed for the above reason. The decision was further delayed by the Court Reporter's failure to present the transcript to the parties in a reasonable period of time. None of the above is the fault of either party but is simply noted for the reason that the parties had agreed this matter should be resolved within 180 days as was set out in Article 1 of the resolution of the open items and receipt of the arbitrator's award. The briefs of the parties were received on February 26.

The standard or factors to be used by the arbitrator in reaching a decision are of prime importance in this matter. The Association has cited the Letter of Agreement dealing specifically with AAI and this arbitration dated April 13, 1989 and contends that either party seeking an exception from the contract is required to establish that such change is "necessary to the success of the operation of Aviation Associates, Inc." On the foregoing basis the Association has urged that its position on hourly pay, longevity pay and the cost of dependent medical insurance coverage are necessary deviations from the Red Book.

The arbitrator has studied the standard to be applied and finds that such is controlled by Paragraph 2 of the Side Letter dated April 13, 1989. That portion of the Side Letter of Agreement expressly incorporates Article 1, Section 6(a) and (b) which reads:

> "the arbitrator shall take into account and must base the decision upon average competitive conditions in the geographic area for wages and working conditions for comparable operations including any ALPA collective bargaining agreements."

The Association has urged that the standard expressed is ambiguous. The basis for this proposition is understood. However no ambiguity is detected in Paragraph 2 of the Side Letter or Article 1, Section 6(a) and (b) which directed the arbitrator to base his decision upon the average competitive conditions as measured by wages and working conditions of comparable carriers in the AAI market. Perhaps it should be noted that the Association points to the November 7 and December 9, 1989 proposals by the Company which were rejected by the Union and has urged this supports their interpretation of the standards. The two proposals have been studied and the arbitrator finds that they are substantially different in language from the Side Letter of Agreement dated April 13, 1989 which was finally agreed upon between the parties and which is controlling herein.

I. REPOSITIONING PAY ISSUE:

The evidence submitted does not warrant a modification of this provision or the addition of this provision to the agreement.

II. and III. FLIGHT PAY FOR CAPTAINS AND FIRST OFFICERS:

There are many factors which had to be studied and considered in determining this question. The other carriers cited by both parties had many other economic issues involved beside the simple hourly block rates. The yearly wages, even the monthly wages, could not be specifically determined from the evidence. Some of the carriers did not guarantee as many hours as those guaranteed by AAI. Also some of the other carriers had more economic benefits which must be taken into consideration. Some of the evidence presented did not include comparable equipment.

All of the data presented by both parties was carefully studied and considered before a decision was reached in this

matter. AAI has suggested that a 3% to 5% increase in wages is reasonable. The average competitive conditions and comparable operations of other carriers in the geographic area were considered. Although others were recognized and considered, those of principal importance were Windward, LIAT, Crown and Seaplane Shuttle flying Twin Otters, Comair flying 19 passenger Metro's and Executive Air flying 19 passenger Casa 212's.

The present rate for Captains is $22.81. A 5% increase would raise that hourly pay rate for Captains to $23.95. A 5% increase is not comparable to the pay rate for Captains at other comparable carriers in the geographic area. The arbitrator is prohibited by the agreement between the parties from considering AAI's ability to pay and the fact that Captains have not received a raise for several years. Under the guidelines set forth above, it is the opinion of the arbitrator that the following pay scales be established for Captains on zero to twenty seat equipment based on time in grade:

YEARS	PAY SCALE
0 to 1 year	$26.00
1 to 2 years	$27.00
2 to 3 years	$28.00
3 to 4 years	$29.00
4 years and over	$30.00

Based on the same criteria as set forth for Captains, the pay scale for First Officers will be established as:

YEARS	PAY SCALE
0 to 1 year	$12.75
1 to 2 years	$13.25
2 to 3 years	$14.00
3 to 4 years	$14.00
4 years and over	$14.00

IV. BLOCK RATES FOR LONGEVITY:

The evidence is insufficient to establish justification for modifying the block rates for longevity increments. Captains' rates will continue to be based on time in grade.

V. WHAT PORTION OF HEALTH AND LIFE INSURANCE PREMIUMS ARE TO BE PAID BY THE COMPANY:

The evidence regarding comparable carriers in the geographic area is mixed. Under the evidence presented the arbitrator finds there should be no modification of the health and life insurance premiums paid by the Company.

VI. CROSS BIDDING:

Management has contended that the provisions authorizing cross bidding are among those explicitly excluded from application to AAI and open before the arbitrator. Regardless of this factor, there is no evidence which would support justification for the arbitrator to find that cross bidding should be authorized. On that basis there will be no modification of the agreement in this regard.

The new pay rates will be retroactive to October 15, 1989.

If the parties are in disagreement as to the application of this award, the arbitrator will retain jurisdiction for sixty days.

PRESTON J. MOORE,
Arbitrator

March 7, 1990